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# The Arrival of Asian Americans An Agenda for Legal Scholarship

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## The Arrival of Asian Americans: An Agenda for Legal Scholarship<sup>†</sup>

Frank H. Wu<sup>‡</sup>

Asian Americans have arrived.

Every generation supposes itself to invent the world anew, but for Asian Americans as a racial minority group, there has been no better time than the present moment. In the past decade, Asian immigrants and their American-born descendants have become so numerous and prominent that it has become impossible to ignore their communities and claims. According to the 2000 census, Asian Americans number approximately 11,899,000, or about four percent of the overall national population of about 281,422,000.<sup>1</sup> Even and perhaps especially those who are alarmed by the changing demographics of the United States, along with scholars studying race matters and activists for racial justice, must take into account Asian Americans. The exact ends and means of integrating Asian Americans should be articulated rather than assumed.

Consider the changes within just the legal academy. Asian Americans and Asian American studies are both flourishing. Without exaggerating Asian American achievements, it can be said – it must be said – the number of Asian American students has increased dramatically. In 1982-83, Asian American enrollment at law schools was only 1,947.<sup>2</sup> In 2001-02, Asian

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<sup>†</sup> This essay is adapted from the author's opening keynote speech for the Asian American Heritage Month observances at the University of Connecticut at Storrs, delivered October 1, 2002. It belongs to a genre of essay no longer much written; it can be read as an exhortation. *See especially* Mari J. Matsuda, *We Will Not Be Used*, 1 *ASIAN PAC. AM. L.J.* 79 (1993), *reprinted in* MARI J. MATSUDA, *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* (1996). The author thanks reference librarian Aimee Mangan, research assistants Aamra Ahmad and Jennifer Lee, and the editors of this journal.

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1. U.S. Census Bureau, 2000 BRIEF: THE ASIAN POPULATION 3 (2002), *available at* <http://www.census.gov>.

2. OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 817 (Wendy Margolis et al. eds., 2003).

American enrollment had increased to 8,421.<sup>3</sup> With this unprecedented quadrupling, Asian American representation exceeds that of other racial minority groups.<sup>4</sup> To take a specific example, at the University of Michigan Law School, a "top ten" school, the number of Asian American students graduating in the class of 1991 was eight out of a overall class of 401, less than two percent.<sup>5</sup> A decade later, the number of Asian American students matriculating in 2001 was 41 out of a class of 361, more than eleven percent.<sup>6</sup> These numbers are especially dramatic since the Asian American population as a whole increased at a rate far below the quintupling of Asian American representation among Michigan students. Furthermore, Asian Americans were not regularly included in an affirmative action program at Michigan, which has become the subject of a recent Supreme Court case testing the constitutionality of affirmative action and likely to result in the reconsideration of *Bakke v. Regents of Univ. of California*.<sup>7</sup> It is likely that other elite schools on the East and West coasts displayed equal or greater increases in Asian American enrollment.

Other indicators of Asian American representation within the legal profession reflect these same trends. Asian Americans are overrepresented, for example, as Supreme Court law clerks (commonly regarded as the most prestigious job for recent graduates).<sup>8</sup>

Asian American legal scholars, rare a decade ago, are common now. Some schools boast more than one Asian American professor, avoiding the risks of tokenism and the burden of representing a race.<sup>9</sup> One among them

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3. *Id.*

4. *Id.*

5. The University of Michigan regularly places within the "top ten" in the U.S. NEWS & WORLD REPORT rankings. See *Schools of Law*, U.S. NEWS & WORLD REPORT, Apr. 19, 2002, at 64 (ranking the University of Michigan as tied for seventh place). Enrollment data can be found in the University of Michigan Law School's 1991 ANNUAL REPORT TO THE AMERICAN BAR ASSOCIATION (on file with author).

6. *Questions and answers about the lawsuit against the University of Michigan Law School*, THE UNIVERSITY OF MICHIGAN LAW SCHOOL, at <http://www.law.umich.edu/newsandinfo/lawsuit/qanda.htm> (Jan. 10, 2003).

7. The University of Michigan cases involve the law school and the undergraduate admissions processes, respectively. See *Gutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 617 (2002); *Gratz v. Bollinger*, 309 F.3d 329 (6th Cir. 2001), *cert. granted*, 123 S. Ct. 602 (2002). See also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (considering the constitutionality of racially conscious admissions processes at the University of California at Davis medical school).

8. See Tony Mauro, *Corps of Clerks Lacking in Diversity*, USA TODAY MAG., Mar. 13, 1998, at A12 (reporting that Asian Americans made up about five percent of Supreme Court law clerks hired by the current Justices during their respective tenures). The numbers are similar in the D.C. Circuit and Second Circuit Court of Appeals. See *Special Committee on Race and Ethnicity*, 64 GEO. WASH. L. REV. 189, 235-36 (1996) (noting that in 1993-94, three of four racial minorities serving as appellate law clerks were Asian American); John Doyle et. al., *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 124, 165 (1997) (noting that almost six percent of law clerks in the Second Circuit are Asian American).

9. Boston College, for example, has five Asian American law professors. *Deans and Faculty*

has become the Assistant Attorney General responsible for legal aspects of the war against terrorism and has been mentioned as a potential nominee to the United States Supreme Court.<sup>10</sup> They have formed a community of sorts. The Conference of Asian Pacific American Law Faculty, celebrating its tenth anniversary, regularly draws several dozen attendees.

Incidentally, it is important to emphasize that scholarship about Asian Americans need not be written by Asian Americans alone. Just as not every Asian American is an Asian Americanist (i.e., a scholar concentrating on Asian Americans), so too not every Asian Americanist is an Asian American. Asian Americanists have rarely promoted racial nationalism and none have supposed that racial membership confers racial expertise. Two of the best among recent publications on the internment of Japanese Americans during World War II are Greg Robinson's *By Order of the President* and Eric Muller's *Free to Die for Their Country*.<sup>11</sup> The leading empirical work on Asian Americans and the admissions process at the University of California was produced by William Kidder.<sup>12</sup> Robinson, Muller, and Kidder are all Caucasian. Ian Fidencia Haney López, author of *White By Law: The Legal Construction of Whiteness*—an acclaimed study of the bar against Asian immigrants naturalizing to become citizens—identifies as a Latino.<sup>13</sup>

A decade ago, Asian American legal scholarship was limited to the study of the internment.<sup>14</sup> Following an important call to action, it is beginning to develop with both traditional scholarship and in an innovative manner.<sup>15</sup> Among the recent works have been: a legal history of Chinese

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Pages, BOSTON COLLEGE LAW SCHOOL, at <http://www.bc.edu/schools/law/fac-staff/deans-faculty/>. The former associate dean of the school has also completed one of the first empirical research studies on the number of Asian American law professors. See Fred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 ASIAN L.J. 39 (1996); see also Pat K. Chew, *Asian Americans in the Legal Academy: An Empirical and Narrative Profile*, 3 ASIAN L.J. 7 (1996).

10. See Eric Lichtblau, *At Home in the War on Terror, Viet Dinh has Gone from Academe to a Key Behind-the-Scenes Role. Conservatives Love Him; Others Find His Views Constitutionally Suspect*, L.A. TIMES, Sept. 18, 2002, at A1.

11. See GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* (2001); ERIC L. MULLER, *FREE TO DIE FOR THEIR COUNTRY: THE STORY OF JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II* (2001).

12. See William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 ASIAN L.J. 29 (2000) (studying the University of California law schools at Berkeley, Davis, and Los Angeles).

13. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF WHITENESS* (1996). He discusses his choice of identifying as a Latino in Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 10 (1994).

14. See FRANK F. CHUMAN, *THE BAMBOO PEOPLE: THE LAW AND JAPANESE AMERICANS* (1976).

15. See, e.g., Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1323 (1993), 1 ASIAN L.J. 1, 81 (1993).

Americans;<sup>16</sup> a monograph on the shaping of Asian Americans through immigration policies;<sup>17</sup> Haney López's *White By Law*;<sup>18</sup> a survey collection of essays on Asian Americans and the law;<sup>19</sup> and more than a dozen major articles concerning Asian Americans and the law.<sup>20</sup> Complementing these efforts, scholars outside of law have incorporated legal history into their broader studies of Asian Americans.<sup>21</sup> Courses on Asian Americans and the law, a novelty that might have been opposed by faculty until recently, have been established through student activism at elite schools.<sup>22</sup> As importantly, the scholarship generated by and about Asian Americans has found practical application.<sup>23</sup> Meanwhile, writers have engaged in vigorous dialogue over the proper role of Asian American identity, the use of narrative, and post-modernist influences in these endeavors.<sup>24</sup>

Yet the challenges for Asian Americans as Asian Americans, a self-identified group distinct from Asian Americans as individuals or members of ethnic sub-groups, continue to be quite complex. Despite being seen as highly intelligent, Asian Americans are rarely visible as public intellectuals.<sup>25</sup> Even within the academy, Asian Americans remain underrepresented beyond the student population and the entry-level. Other than the late Chang Lin Tien, the ex-Chancellor of the University of

16. See CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* (1994).

17. See BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990* (1993).

18. See HANEY LÓPEZ, *supra* note 13.

19. See ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES (Charles McClain ed., 1994).

20. Collectively, the Boalt Hall *Asian Law Journal* and the UCLA *Asian Pacific American Law Journal* have published a significant number of articles addressing this issue.

Gabriel Chin has written a series of important articles that incorporate Asian immigrants and Asian Americans into U.S. legal history more generally. See, e.g., Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1 (2002); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Gabriel J. Chin, *The First Justice Harlan By the Numbers: Just How Great was 'The Great Dissenter?'*, 32 AKRON L. REV. 629 (1999); Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

21. See ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY (Hyung-Chan Kim ed., 1992); FRANKLIN ODO, *THE COLUMBIA DOCUMENTARY HISTORY OF THE ASIAN AMERICAN EXPERIENCE* (2002). Neil Gotanda's essay on the perpetual foreigner syndrome in Kim's volume has been especially influential. See Neil Gotanda, *Asian American Rights and the 'Miss Saigon Syndrome'*, in ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY (Hyung-Chan Kim ed., 1992).

22. See, e.g., John Hayakawa Tork, *Coalitional Theory and Praxis: Social Justice Movements and Latcrit Community*, 13 LA RAZA L.J. 21 (2002).

23. See, e.g., Gabriel Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action* (1996), reprinted in 4 ASIAN PAC. AM. L.J. 129 (1996).

24. See, e.g., Jim Chen, *Unloving*, 80 IOWA L. REV. 145 (1994). See generally Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1994).

25. See Frank H. Wu, *The Invisibility of Asian-American Scholars*, CHRONICLE OF HIGHER EDUCATION REVIEW, June 14, 2002, at 12.

California, Berkeley, there have been very few Asian American university administrators at higher levels.<sup>26</sup> There is no Asian American law school dean and has been none since Wallace Loh served in that position at the University of Washington.<sup>27</sup> A black-white paradigm is still dominant, even in otherwise excellent empirical work, and it is assumed to be factually correct without substantial analysis.<sup>28</sup> Such an approach leads to the exclusion of Asian Americans, Latinos, and other non-African American minority groups, or implicitly deems them to be the equivalent of blacks or whites. It treats the black-white color line as if it were not only historically the primary division in the nation, but also still suitable for a comprehensive description of racial dynamics.

A decade ago, Asian Americans confronted the dual struggles of overcoming the model minority myth and the perpetual foreigner syndrome.<sup>29</sup> Now, while Asian Americans still face the difficulties of persuading others that they belong as equals within the civic culture and are not all uniformly so super-successful as to be threatening, Asian Americans must determine what it is they can and should legitimately and effectively seek as a discrete political bloc.<sup>30</sup> Asian Americans must have something to be if not whiz kids and something to say aside from "we're here to stay." Anyone who has been exposed to Asian American studies is likely familiar with preliminary refutations of popular stereotypes, but virtually all who finish an Asian American studies course and continue to be engaged with the subject are equally likely to be dissatisfied with stopping at debunking.

For like anyone else who gains a measure of empowerment after agitating from the outside, Asian Americans are learning that it turns out to be altogether another issue how to use that power once on the inside. Given the risks of backlash towards uniting along racial lines even for

26. See Roy H. Saigo, *Academe Needs More Leaders of Asian-Pacific Heritage*, CHRONICLE OF HIGHER EDUCATION, April 23, 1999, at A72 (discussing the absence of Asian Americans among leaders in higher education).

27. Wallace Loh served as Dean of the University of Washington Law School from 1990 to 1995. See Roberto Sanchez, *Locke Education Aide Takes SU Job*, SEATTLE TIMES, May 6, 1999, at B3.

28. See, e.g., RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, ADOPTION* (2003). Asian American legal scholars themselves are not immune from this influence. Goodwin Liu, for example, does not consider the role of Asian Americans in the affirmative action debate, even though his critique of the "Bakke fallacy" debunks the notion that every non-beneficiary of the programs has been directly harmed by their operation. See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002).

29. See FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2002); see also Keith Aoki, "Foreign-Ness" & Asian American Identities: *Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1 (1996); Pat K. Chew, *Asian Americans: The "Reluctant" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1 (1994).

30. The behavior of Asian Americans as a political bloc is highly controversial, as shown by the 1996 campaign finance scandal involving allegations of Asian Americans improperly influencing the Clinton-Gore re-election campaign. See Frank H. Wu & Francey Lim Youngberg, *People from China Crossing the River: Asian American Political Empowerment and Foreign Influence*, in ASIAN AMERICANS AND POLITICS: PERSPECTIVES, EXPERIENCES, PROSPECTS (Gordon Chang ed., 2001).

defensive purposes such as addressing hate crimes, not to mention the tendency toward complacency once the urgency of mutual protection begins to subside, Asian American together must develop a principled agenda if we are to give the concept of "Asian American" as a group any substantive content. Such principles must be genuine, which is to say universal; they cannot appeal to Asian Americans exclusively or be indefensible if expressed openly in a diverse democracy. They must be dynamic and deliberative. The demand for inclusion should be supplemented by proposals for action.

Perhaps it is easier to identify what ought not be done, rather than what ought to be done. Aside from the obvious point of avoiding self-congratulation, the most important admonition is to reject self-interest. Failing that, critics of multiculturalism would be proven correct in their allegation that organizing by racial minority groups is barely distinguishable from what they would disparage as "special pleading."<sup>31</sup> To be sure, there are established Asian American associations (or more commonly, associations for respective Asian ethnicities) that are less than charitable, but by their very nature they tend to be devoted to socializing rather than advocating. Better that we be self-critically ambivalent about Asian American group identity rather than selfishly ambitious about it.

The suggestion that racial minority group identity has ethical consequences is not the same as the naïve hope that all will share the same conception of the common good. It may well be foolhardy to disregard natural instincts and rational choices that biologists, psychologists, and economists assure us guide our every action, whether consciously or not, toward what is best for ourselves even under the guise of altruism—albeit acknowledging that the foundational empirical statements of this genre of writers is hotly disputed.<sup>32</sup> Even if this neo-Social Darwinism correctly predicts that each of us as individuals may do what we will out of innate affinities for the propagation of genes, if Asian Americans are to come together as an entity greater than an individual but lesser than the nation, if we are to be what would have been condemned by the Founders as a faction at best,<sup>33</sup> we are compelled toward coalitions. Indeed, Asian

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31. See generally TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS* (1995); NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* (1997); ROBERT HUGHES, *CULTURE OF COMPLAINT: THE FRAYING OF AMERICA* (1993); JOHN J. MILLER, *THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED THE ASSIMILATION ETHIC* (1998); MICHAEL J. PIORE, *BEYOND INDIVIDUALISM* (1995); ARTHUR M. SCHLESINGER JR., *THE DISUNITING OF AMERICA* (1991).

32. The literature on evolutionary psychology is vast. I have relied on the popular accounts by RICHARD DAWKINS, *THE SELFISH GENE* (2d ed. 1989); see also MATT RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE* (1994); MATT RIDLEY, *THE ORIGINS OF VIRTUE, HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION* (1997); ROBERT WRIGHT, *THE MORAL ANIMAL: EVOLUTIONARY PSYCHOLOGY AND EVERYDAY LIFE* (1994).

33. See James Madison (writing as "Publius"), *The Federalist X* (1787), reprinted in *THE DEBATE*

Americans are an artificial coalition among many whose ancestors would have hated one another with an intensity equaling any domestic bigotry toward any of them.<sup>34</sup> When individuals become Asian Americans in the best sense, they are bridge building and not balkanizing.

There is, too, a particular type of self-interest that is prevalent among Asian Americans: ethnocentric transnationalism.<sup>35</sup> Typically for financial gain though possibly also for political power, ethnocentric transnationalism consists of the use of racial and ethnic ties to transcend citizenship and national boundaries. For example, it is the effort to forge a "greater China" trade network that encompasses every person of pure Chinese heritage. The goal can be fulfilled only by more than merely encouraging solidarity among diaspora – it requires that Asian Americans identify "our people" or "my people" in racial rather than national terms, with the priority given to the Asian above the American. Such an ethnocentric transnationalism, usually envisioned in terms that are economically privileged as well as racially restrictive, is markedly unlike either aspirations to cosmopolitanism or responses to the excesses of racial nationalism; it rejects the former and extends the latter.<sup>36</sup> Ironically, it embraces exactly what was once feared as the "Yellow Peril," and continues to be assailed as "dual loyalty," taking comfort in exactly what others would find downright menacing. Racial and ethnic affiliations are expected to trump citizenship and national allegiances, rather than vice versa.

Among Asian Americans, only Japanese Americans display no widespread sentiment favoring ethnocentric transnationalism. With the history of the internment and the hyper-patriotism of groups such as the Japanese American Citizens League, and without continuing migration save for business executives who do not mean to settle, this exceptionalism is hardly coincidental.<sup>37</sup> In the era after Pearl Harbor, it would scarcely have been possible for Japanese Americans to sustain ethnocentric transnationalism, unless individuals wished as only a few did to renounce their citizenship or request repatriation – and then under duress and with understandable recanting. In contrast, along with Chinese Americans, Korean Americans, Filipino Americans, South Asian Americans, Southeast

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ON THE CONSTITUTION, PART ONE, 404 (Bernard Bailyn ed., 1993).

34. See YEN LE ESPIRITU, *ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES* (1992).

35. For works that describe the phenomenon and embody it, see *THE ENCYCLOPEDIA OF THE CHINESE OVERSEAS* (Lynn Pann ed., 1999); *THE EXPANDING ROLES OF CHINESE AMERICANS IN U.S.-CHINA RELATIONS: TRANSNATIONAL NETWORKS AND TRANS-PACIFIC INTERACTIONS* (Peter H. Koehn & Xiao-huang Yin eds., 2002).

36. A recent prominent debate on the possibility of cosmopolitanism is MARTHA C. NUSSBAUM, *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* (Joshua Cohen ed., 1996).

37. See Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385 (1998) (criticizing hyperpatriotism).



Asian Americans, and all other Asian American ethnic subgroups seem to harbor a longing for ethnocentric transnationalism at high rates. There is not yet any counterpart to the internment that might prompt re-thinking of these proclivities.

Subtleties matter here. Asian Americans have the right and should be encouraged to pursue opportunities in Asia no differently than Irish Americans might in Ireland, Cuban Americans in Cuba, African Americans in Africa, or, for that matter, Irish Americans in China. And there is a history of selectively exaggerating the threat of ethnocentric transnationalism, rendering every Chinese immigrant the vanguard of an invading force, as was set forth in the Supreme Court plenary power cases.<sup>38</sup> Nonetheless, Asian Americans will serve themselves poorly if they are aggressive (again, as Asian Americans rather than as individuals) in advancing explicitly Asian (and not Asian American) group objectives – working on behalf of Asian governments or Asian corporations with the assertion that Asians as Asians are obligated to do just that, or, worse, instinctually inclined thus. Such behavior would be neither principled nor strategic. Asian Americans would be hard-pressed to explain why others ought not respond to their group identity with alarm if not opposition, nor would they likely be able to sustain their projects against certain hostility.

As a movement, Asian Americans have been weak in two respects that must be remedied. These tasks deserve to be made a priority.

First, Asian Americans have failed to be “Asian Americans.” All too many organizations, local and national, employ the rubric “Asian American,” but turn out to be dominated only by Japanese Americans and Chinese Americans.<sup>39</sup> As a consequence, even as they have started to gain representation within the Asian American movement, many Korean Americans, among others, have formed independent groups. South Asians, Filipinos, Southeast Asian refugees, Asian adoptees raised by non-Asian families, and children of mixed race backgrounds that include Asian ancestry all remain outsiders. Faux Asian Americans count them to brag about numbers, but they are absent as people.<sup>40</sup> The term “the Asian American experience” is a misleading phrase, for there are multiple Asian American experiences. To the extent that “Asian American/Pacific Islander” is used, it too is a misnomer. Pacific Islanders, like many indigenous peoples, are only alluded to superficially, but omitted from substantive consideration.

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38. See, e.g., *Ting v. United States*, 149 U.S. 698 (1893); *Ping v. United States*, 130 U.S. 581 (1889).

39. See WU, *supra* note 29, at 337-38 (quoting speech by civil rights lawyer William Tamayo, in which he compared his empathy for Japanese Americans interned during World War II with his Filipina mother's lack of empathy due to her personal experiences of wartime).

40. See ESPIRITU, *supra* note 34.

Asian Americans have our own issues of gender, sexual orientation, and disability; in some aspects, we are less liberal than the nation as a whole and invoke the so-called "cultural defense." Asian Americans may accept a subordinate role for women, repress homosexuality as a Western perversion, and shun the disabled, in the name of a culture that may be as fanciful as it is factual.<sup>41</sup> Even as Asian Americans insist that scholarship about race should be genuinely about race inclusively, so too scholarship about Asian Americans should be about Asian Americans inclusively. Without that scope, "Asian American" is an appropriation of a term, and but a modest improvement on a black-white paradigm.

Second, Asian Americans have failed to be people of color. Asian immigrants may be oriented toward homeland politics, perceiving of themselves as exiles rather than minorities, a diaspora rather than a domestic group. With no apparent self-consciousness, they are able to refer to white Americans as "foreigners" in their native tongue or to equate "white" and "American" even though they refer to black Americans as "blacks," as if to confirm that blacks are defined by skin color above all. They may not, therefore, be especially concerned about civil rights here and now. Their adaptive strategy does not depend on securing civil rights, because they have confidence, possibly unwarranted, that outward conformity, innate talent, and their willingness to work harder than the next person will allow them to prevail. They are wagering on their secret sense of their own superiority.

As a side effect, all too many Asian Americans disassociate themselves from African Americans and Latinos. Interracial conflict among people of color is a complicated problem, with much blame to be shared. Asian Americans have been both perpetrators and victims, sometimes simultaneously so, rendering the terms "perpetrator" and "victim" less useful than inflammatory by giving up pragmatism for blame.<sup>42</sup> At the very least, Asian Americans should concede responsibility for some of the problems: Asian Americans ignore and denigrate African Americans and Latinos at their own peril.

Scholarship that considers Asian American examples lends itself to comparative work. For instance, the Japanese American internment is important to both the debate over the appropriate treatment of Arab Americans during the war on terrorism and the debate over reparations to

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41. See, e.g., Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001); Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996); Leti Volpp, (Mis)IDENTIFYING CULTURE: ASIAN WOMEN AND THE "CULTURAL DEFENSE," 17 HARV. WOMEN'S L.J. 57 (1993); SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN (Joshua Cohen ed., 1999); Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994).

42. See ERIC YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST CIVIL RIGHTS AMERICA* (1999); Eric Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 ASIAN PAC. AM. L.J. 33 (1995).

African Americans for the practices of chattel slavery.<sup>43</sup> Scholarship suffers for the neglect of comparative possibilities. For instance, scholarship that addresses illegal immigration as if it were solely Hispanic would be ahistorical, ignoring the subterfuges employed when Asians were barred from entry, and it would be inaccurate, overlooking the current flow of undocumented persons from Asia. Asian Americans may be able to pass into whiteness by collective upward mobility, hastened by a denial of common cause with African Americans, Latinos, Arab Americans, and others, but that form of assimilation would be complicit in racial hierarchy.

Asian American legal scholarship needs an agenda guided by principles and high standards. There is much to be done. Scholars can and should write the legal history of Asian Americans, for its own sake as well as for what it reveals about race in general. Faculty members who happen to be Asian American can and should also participate in the public discourse about race and civil rights in a manner inclusive of Asian Americans. Just a few examples of the worthwhile topics of research are: histories of U.S. colonialism in the Philippines, the murder of Vincent Chin in Detroit in 1982, major cases ranging from *Wong Kim Ark* to the Vietnamese fishermen litigation against the Ku Klux Klan; and analyses of legal issues arising from African American-Asian American tensions, transnational adoptions, the admission and resettlement of Southeast Asian refugees, and the treatment of Amerasian children fathered by U.S. military personnel overseas.

In its maturity, Asian American legal scholarship also must display merit as legal scholarship, even as it may contest conventional measures of merit and demonstrate the multiple forms of merit.<sup>44</sup> It ought to be unnecessary to say so, but it bears repeating given allegations to the contrary, that Asian American legal scholarship is in this respect no

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43. See, e.g., Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1 (2001).

44. For the scholarship on the merits of legal scholarship, see, e.g., Frances Lee Ansley, *Stirring the Ashes: Race, Class, and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989); Paul F. Campos, *Advocacy and Scholarship*, 81 CAL. L. REV. 817 (1993); Roger Crampton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1 (1986); Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39 (1991); David L. Gregory, *The Assault on Scholarship*, 32 WM. & MARY L. REV. 993 (1991); Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221 (1988); Ronald J. Krotoszynski, Jr., *Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption*, 77 TEX. L. REV. 321 (1998); Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992). See also Symposium, *Law, Knowledge and the Academy*, 115 HARV. L. REV. 1277 (2002); Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991). Cf. MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW (1997).

The argument that legal scholarship must have practical use was advanced by Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). The proposition was subsequently considered in Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993).

different than any other legal scholarship.<sup>45</sup> Its descriptive assertions should be true or at least subject to verification or falsification, and not inaccurate, ideological, or rhetorical. Its normative positions should proceed from skepticism rather than dogmatism. This allows for the possibility that Asian American legal scholarship might be quite traditional, without any component that is applied or directed toward reform. It may be, for example, purely a doctrinal study of laws aimed at preventing miscegenation. Even then, however, the focus on Asian Americans constitutes an implicit argument that the project of documenting racial policies affecting Asian Americans is intrinsically valuable.

Finally, there is much reason for Asian Americans to be positive. Asian Americans occupy an uneasy place: it is neither within the mainstream nor at the margins.<sup>46</sup> More accurately, Asian Americans stand at the intersection – or more properly, several intersections. Asian Americans are uniquely situated to help bridge the cultural gap between Asia and America and the socio-economic gap between blacks and whites.

Globally, Asian Americans claim to be both Asian and American. This dual identity may be untenable. The predicted “clash of civilizations” explicitly identifies violent conflicts between the East and West as inevitable.<sup>47</sup> The theory that a “clash of civilizations” is forthcoming or is already underway does not specify the expectations for Asian Americans and other immigrants, who could be taken as part of the rise of the East or the decline of the West. Neither role is enviable. A choice between sides during actual warfare will be compulsory.

Domestically, Asian Americans claim to be Asian Americans and neither black nor white. That unique position also may be unstable. Asian Americans face housing segregation, for example. In purchasing homes, the act that signals achievement of the “American Dream,” Asian Americans do not possess the same options as whites. But in aggregate factual terms, Asian Americans have more options than blacks.<sup>48</sup> To the

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45. It can and should overcome the thoughtful objections set forth in DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) and Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). Some of these objections are methodological (as in a rejection of post-modernism) or relate to specific pieces of scholarship; they should not be confused with wholesale condemnation of a line of inquiry. See also Ilhyung Lee, *Race Consciousness and Minority Scholars*, 33 CONN. L. REV. 535 (2001).

46. See GARY Y. OKIHIRO, *MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE* (1994); see also Symposium, *Citizenship and Its Discontents: Centering the Immigrant in the Inter/National Imagination*, 76 OR. L. REV. 207 (1997).

47. See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

48. See Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199 (2001) (presenting overall housing segregation data); see also Sheryll D. Cashin, *Drifting Apart: How Wealth and Race Segregation are Reshaping the American Dream*, 47 VILL. L. REV. 595, 596-97 (2002) (comparing segregation from Caucasians of African Americans, Latinos, and Asian Americans).

extent that Asian Americans have self-selected ethnic enclaves such as Monterey Park, California, and possess the financial wherewithal to make modest choices, it might well be that their creation of a minority community depends on insulating themselves from whites, and, more troubling, blacks and Latinos. So Asian Americans must take on these tasks of increasing understanding and decreasing disparities whether or not they wish to do so.

Beyond that, the Asian American project is only beginning. The time came for Asian Americans to be included; we were included, through our struggle and effort. The time has come for Asian Americans to participate; we are participating, through our struggle and effort. The time is coming for Asian Americans to lead; we will lead, but only through our struggle and effort.

Literally and figuratively, our arrival is not a finished outcome, but a continuing process.

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The middleman theory is discussed in Tanya Kateri Hernandez, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731 (1997). See generally IVAN LIGHT & EDNA BONACICH, IMMIGRANT ENTREPRENEURS: KOREANS IN LOS ANGELES, 1965-1982 (1988); PYONG GAP MIN, CAUGHT IN THE MIDDLE: KOREAN MERCHANTS IN AMERICA'S MULTIETHNIC CITIES (1996); Edna Bonacich, *A Theory of Middleman Minorities*, 38 AM. SOC. REV. 583 (1973); Eugene F. Wong, *Asian American Middleman Minority Theory: The Framework of an American Myth*, 13 J. ETHNIC STUDIES 51 (1985).